IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 599 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
BHAVIN COSMETIC AND PHARMACEUTICALS PVT.LTD. & 3 – Respondents

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Appearance :

MR MA PATEL ADDL PBLIC PROSECUTOR for Appellant : 1,
MR SV RAJU for Respondents : 1 - 4.

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 15/12/2006

ORAL JUDGMENT

1. Heard Shri Patel, learned Addl.P.P. for the appellant and Shri S.V.Raju, learned counsel appearing for the respondents.

2. The appellant – State of Gujarat has preferred this Appeal under Section 378(3) of the Code of Criminal Procedure (herein after referred to 'the Code') challenging the order dated 28.2.2000 passed by learned Second Joint JMFC, Godhra in Criminal Case No. 2164 of 1997.

3. This Court (Coram: J.R.Vora, J.) on 20.9.2004 passed the following order :

> “Notice for final hearing. Mr. S.V. Raju, learned counsel waives service on behalf of the opponents. Learned APP is directed to call for the necessary record and obtain necessary instructions. Office is directed to call for the Record and Proceedings of the trial Court so as to reach this Court on or before 11th October, 2004. S.O. to 11.10.2004”

Today, this matter is taken up for final disposal.

4. Brief facts leading to filing this proceedings deserve to be set out as under.

5. The original complaint was at the relevant time discharging his duties as duly appointed Drug Inspector since 29.8.1991 and he was discharging his duties as such under the Assistant Commissioner, Food and Drugs Control, Godhra since 17th June, 1997. The complainant was appointed under Section 21 of the Drugs and Cosmetics Act, 1940 (herein after referred to as 'the Act' for short). The accused No. 1 is the firm running in the style and title of “Bhavin

Chemicals and Pharmaceuticals Pvt. Ltd.” Godhra, District : Panchmahals and accused Nos. 2, 3 and 4 are partners in the said firm. The firm was producing Phenyl Butazone IP, Phenyl Butazone BP and Phenyl Butazone USP as per the licence Form No. 25 issued on 2.1.1990. The licence was renewed upto 31.12.1993. It is the case of the complainant that this firm had not applied for renewal of the licence for producing the aforesaid products after 31.12.1993 nor did they do any procedure for payment of additional fees for renewal before 30th June, 1994. The complainant's office at Godhra received telephonic instructions on 16.8.1994 from the Head Office at Gandhinagar that the accused No. 1 producer firm was engaged in the production of Calcium Phenyl Butazone without due licence and therefore, it was required to be inquired into. The Head Office letter dated 11.8.1994 to this effect was received by his office on 24.8.1994. It appears that under the aforesaid instructions, the Drug Inspector alongwith Incharge Assistant Commissioner visited the accused's firm on 16.8.1994. At that time approved analytical Chemist Shri Vitthalbhai Patel was present. Shri Vitthalbhai Patel had stated that Calcium Phenyl Butazone was produced in their firm from 17.7.1994 and on 18.7.1994. The bench No.103 and 107 were produced. This voluntary statement was recorded and the quantity of the aforesaid Bench was noticed in

the firm. The concerned Drug Inspector collected the sample for analysis and examination and informed the accused persons in Form No. 17. The same was counter signed by Shri V.V. Patel, who was present in the firm. One portion thereof was given to Shri V.V. Patel, who was present at the time of raid and remaining two portions were sent for Public Analyst alongwith Form No. 18 memorandum on 17.8.1994. The seal impression was separately sent by registered post AD. The Public Analyst has sent his report on 21.10.1994, which indicated the product to be Phenyl Butazone. The report was forwarded to the accused on 3.12.1994. On 18.8.1994, the Drug Inspector of Godhra Circle had visited the firm and seized the quantity of Calcium Phenyl Butazone. After drawing due panchnama, the voluntary statement of Shri Mangalbhai Somabhai Patel, accused No. 2 came to be recorded as per the provisions of the Act and the Rules. They did not have the licence for producing Calcium Phenyl Butazone. The bill of sale etc. were also obtained. The product of calcium Phenyl Butazone is covered under the definition of Drug as per Section 3(b) of the Act. After following the procedure, the complaint appears to have been lodged on 16.10.1997, which came to be registered as Criminal Case No. 2164 of 1997. It appears that the accused made an application before the trial Court at Ex. 34 praying that the offence alleged against them is breach of

Section 27(b)(ii), which provides for punishment of imprisonment not less than 1 year and upto 3 years, therefore, as per the provisions of the Code, and Section 468, the complaint was required to be filed within 3 years from the date on which the commission of offence was disclosed i.e. 18.8.1994. Therefore, the complaint ought to have been filed within 3 years and as the complaint is filed after a lapse of period of limitation, the same should be dismissed on account of it being time barred or not filed in period of limitation. The trial Court has discussed at length the relevant provisions of law and rival contentions advanced on behalf of the respective parties and come to the conclusion that as the complaint is filed beyond the period of limitation and in absence of any cogent evidence or affidavit, explaining the delay, the application was allowed and the accused were acquitted of the commission of offence punishable under Section 27(b)(ii) of the Act vide its order dated 20.2.2000, which is impugned in the present appeal.

6. Shri Patel, learned Addl.P.P. has submitted that the impugned order in the Appeal deserves to be quashed and set aside as the same is erroneous and contrary to the evidence on record and therefore, the same deserves to be quashed and set aside. Shri Patel has submitted that the trial Court ought to have appreciated the fact that as per the provisions of Section 468,

though the complaint was required to be filed within 3 years, the provisions of Section 470 of the Code ought to have been borne in mind, which provides for exclusion of time in certain cases. Shri Patel has led stress on Subsection (3) of Section 470 of the Code and urged that time taken in obtaining the necessary sanction and/or sanction for lodging the prosecution or complaint ought to have been excluded by the trial Court. The trial Court has as not excluded this time, therefore, committed an error, which has resulted into miscarriage of justice. Shri Patel has submitted that in the alternative, the limitation may starts not from the date of discloser of the offence but it should from the date, when the report of analyst was received i.e. from 21.10.1994. If the period of limitation is reckoned from 21.10.1994, then the complaint which was filed on 16.10.1997 can be said to have been filed within time and therefore, even on this ground also the impugned order appears to be erroneous and therefore, the same deserves to be quashed and set aside. Shri Patel has submitted that though the report is in the nature of confirmatory evidence, that the accused firm was producing Calcium Phenyl Butazone, which was confirmed in the report before lodging the complaint and therefore, it can be said that the commission of offence disclosed from the date of report and not from the date of seizing the article i.e. on

18.8.1994. Shri Patel has submitted that even otherwise also the decision of the trial Court is erroneous, perverse and therefore, the same deserves to be quashed and set aside.

7. Shri Raju, learned counsel appearing for the respondents – original accused has submitted that the impugned judgment clearly shows that it was never the case of the prosecution that due to non availability of the report till 21.10.1994, the matter was not proceeded for lodging the prosecution, in fact, it is not the case of the appellant in their memo of Appeal. He also submits that even assuming for the sake of submission that such a plea is permissible, without laying foundation thereof in the appeal, then also, looking to the conduct and approach of the prosecution and Drug Inspector, it can well be said that the offence of producing Calcium Phenyl Butazone without valid licence is disclosed right on the day i.e. when they seized the goods from the factory premises i.e. 18.8.1994. Shri Raju has invited this Court's attention to the procedure of seizing undertaken by the Inspector and submitted that had there been no clarity in the mind of the prosecution and/or Drug Inspector while seizing the goods on 18.8.1994 in respect of material, the seizure itself would not have been effected. The offence is that of producing the goods without licence in breach of Section 18 of the Act. On 18.8.1994, it was clear and concluded so far as

the prosecution is concerned that the drug in question i.e. 'Calcium Phenyl Butazone' was produced without licence by the accused and accused firm. Thus it was open to the Drug Inspector to lodge the complaint right then as the requisite licence was not found with the accused and goods in question were produced admittedly, without licence, which required valid licence for production. Shri Raju has submitted that the case of the prosecution before the trial Court was that they were awaiting the consent and/or sanction for lodging the complaint and it is not the case before the trial Court of the prosecution that because of non-availability of the report, the complaint had not been filed. Shri Raju has submitted that looking to the provisions of Section 32 of the Act, it becomes clear that for lodging prosecution and/or filing complaint, no express sanction is required to be obtained by the concerned Inspector and therefore, the benefit for exclusion of time taken for sanction as envisaged under Section 470 of the Code was not applicable in the instant case. Shri Raju has further submitted that the trial Court has in unequivocal terms noted a time and again at various places in the judgment that time taken by the complainant in initiating the prosecution has remained unexplained. There is no evidence and/or even the affidavit coming on the record explaining the delay in lodging the prosecution.

Shri Raju has relied upon the following decisions:

(i) (2005) 1 SCC p.122 in case of Zandu Pharmaceutical Works Ltd. And others Vs. Mohd. Sharaful Haque and another.

(ii) (2003) 7 SCC p.254 in case of Ramesh Chandra Sinha and others Vs. State of Bihar and others.

(iii) (1978) 2 SCC p.403 in case of Surinder Mohan Vikal Vs. Ascharaj Lal Chopra.

(iv) 1985 GLH p.496 in case of Prakashbhai Kanjibhai Solanki Vs. State of Gujarat and Another.

in support of his submission that benefit of exclusion cannot have been given to the prosecution and it is rightly not given and time barred complaint deserves to be dismissed. Shri Raju has therefore, submitted that in view of this facts and circumstances, this being an acquittal appeal, this Court may not interfere with the order of acquittal in absence of any cogent plea on the part of the appellant that same has resulted into miscarriage of justice.

8. This Court has perused the records and proceedings and heard the counsel of the parties at length.

9. It is important to note that complainant has essentially based his case upon the fact that on the relevant date, the accused were found producing the aforesaid drugs without any valid licence. When this is the base for the

complaint, it has become evident that commission of offence was disclosed right on the day the drug was seized i.e. on 18.8.1994. Section 18 of the Act prohibits manufacturing and sale of certain drugs and cosmetics without valid licence. The drug called Calcium Phenyl Butazone being one of such drugs, the accused were under obligation for having valid licence for manufacturing and selling the same. The complaint has therefore, been filed against the accused for producing and selling the drug called Calcium Phenyl Butazone without valid licence and therefore, they have committed an offence attracting penalty under Section 27(b)(ii) of the Act. The prosecution for such breach is provided in Chapter, dealing with such breach and Section 32 of the Act provides that Drug Inspector is competent to lodge the complaint. Section 32 of the Act deserves to be set out as under :

> **"Section 32 :Cognizance of offences** – (1) No prosecution under this Chapter shall be instituted except by an Inspector;
>
> (2) No Court inferior to that of [a Metropolitan Magistrate or of a Judicial Magistrate of the first Class] shall try an offence punishable under this Chapter.
>
> (3) nothing contained in this chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence

against this chapter.”

Thus, Section 32 enables the Drug Inspector to institute a complaint for attracting penalty under Section 27(b)(ii) of the Act. It does not require Inspector to obtain any previous sanction for lodging the complaint. It would be expedient to look at the provisions of Section 33, which is in Chapter IV-A, whereunder, before lodging the prosecution, the Inspector is required to obtain specific sanction of the authority specified under Subsection 4 of Section 33-G of the Act. Subsection 4 of Section 33-G deserves to be set out as under.

“**Section 33-G : Inspector** :

(1) xxxxx xxxxx xxxxx

(2) xxxxx xxxxx xxxxx

(3) xxxxx xxxxx xxxxx

(4) Every Inspector shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (45 of 1860), and shall be officially subordinate to such authority as the Government appointing him may specify in this behalf.

10. The statute contains express provisions of obtaining prior permission from the competent authority for lodging prosecution in some of the breaches and in case of other breach, no such express provision is found for lodging prosecution. Therefore, wherever it is not provided and the Inspector is made eligible to file complaint, it can be said that the

complaint was required to be filed without any sanction from the authority. Reading Section 32 in juxtaposition with Section 33 makes it abundantly clear that so far as breach in Section 18 and attraction of penalty under section 27(b)(ii) is concerned, there was no requirement of obtaining proper sanction of the Competent Authority for lodging the complaint as it is clear from Section 32 of the Act. Therefore, the benefit envisages under Section 470(3) of the Code of exclusion of the time is not available to the prosecution.

11. The contention of Shri Patel that the offence is said to have been disclosed only on the receipt of the report of the Public Analyst is also not well founded. Shri Patel was permitted to elaborate his submission on this point, however, he could not point out from the record that the report in question had been produced or that report of the Public Analyst dated 21.10.1994 had been made basis for lodging the prosecution. As the tenor of the entire complaint would show the same was based upon breach of Section 18 of the Act and seeking penalty under Section 27(b)(ii) of the Act, therefore, the prosecution cannot be permitted to take shelter under specious plea of discloser of offence only on report of Public Analyst dated 21.10.1994. As it is stated hereinabove, the conduct of the prosecution and the Drug Inspector -complainant in seizing the drug right

on 18.8.1994, go unequivocally to show that the offence attributing penalty under Section 27(b)(ii) was disclosed and acted upon right on the day i.e. on 18.8.1994.

12. It is important to note that the trial Court has time and again in the judgment impugned noted that there was no explanation whatsoever come forward from the prosecution for time taken in lodging the complaint. No documentary evidence or any affidavit explaining and justifying the delay has been placed on record of the trial Court. In view of these facts and circumstances, the order impugned cannot be said to be unjust and/or perverse so as to result into miscarriage of justice.

13. In view of the aforesaid discussion, this court is of the considered view that the order impugned in this appeal does not call for any interference and therefore, the appeal fails and it deserves to be dismissed and accordingly it is dismissed.

(S.R.BRAHMBHATT, J.)

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